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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER D., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; PAULA D., Real Party in Interest.	G051791 (Super. Ct. No. 13D006386) O P I N I O N

Original proceedings; petition for a writ of mandate or prohibition to challenge orders of the Superior Court of Orange County, Debra C. Carrillo, Judge. Petition granted in part and denied in part. Motion to strike exhibits. Granted.

Kearney | Baker and Gary W. Kearney for Petitioner.

No appearance for Respondent.

Patricia Cyr and Alan S. Yockelson for Real Party in Interest.

* * *

INTRODUCTION

Christopher D. (Christopher) has filed a petition for writ of mandate or prohibition challenging two orders made by the respondent court arising out of the proceeding to dissolve his marriage with real party in interest Paula D. (Paula). First, Christopher challenges an order made following an evidentiary hearing that he have no visitation or contact with their two daughters, T.D. and F.D., until the expiration of a five-year domestic violence restraining order entered against him under the Domestic Violence Prevention Act, Family Code section 6200 et seq. (DVPA). Second, he challenges an order, made on an ex parte basis and without a hearing or notice to him, permitting Paula to move to England with T.D. and F.D.

We grant Christopher's writ petition in part and order the issuance of a peremptory writ of mandate directing the respondent court to (1) conduct an evidentiary hearing on the issue of visitation and contact, make appropriate findings, and issue a new visitation and contact order; (2) conduct an evidentiary hearing on Paula's request to move to England with T.D. and F.D.; and (3) conduct an evidentiary hearing to determine permanent custody. We will not, however, vacate any part of the domestic violence restraining order or the ex parte move-away order and will not require Paula, T.D., and F.D. to return to Orange County pending the evidentiary hearings. As we shall explain, the record disclosed exigent circumstances justifying the respondent court's ex parte order permitting Paula to move to England with T.D. and F.D.

FACTS AND PROCEDURAL HISTORY

I.

Background

Christopher and Paula were married in March 2007. They have two children, T.D., born in 2007, and F.D., born in 2008. Paula is a British citizen.

In July 2012, Christopher and Paula, who had separated, agreed on a six-month temporary custody order, with legal and physical custody to Christopher, and weekly three-hour visitation rights to Paula on Tuesday evenings, and weekend visitation on a biweekly basis.

Christopher filed for dissolution of marriage in July 2013. At the same time, Christopher filed for a domestic violence restraining order against Paula. He alleged that Paula punched him with a closed fist in front of one of the children and threatened to smash him in the face with his laptop computer. He alleged that Paula would return to the United Kingdom and take the children with her.

In January 2015, Paula filed a request for a temporary domestic violence restraining order against Christopher under the DVPA. Paula alleged Christopher "hit, choked, scratched, pushed, and otherwise abused" her and once pulled a gun on her, causing her to fear for her life. Paula, who had worked as an actress in the adult film industry, alleged that Christopher forced her to have sex with other men while he listened or watched over Skype and that he otherwise intimidated her and forced her to stipulate to giving him sole legal and physical custody of their children in 2013.

Two days after Paula filed her request for a domestic violence restraining order, Christopher filed another request for a domestic violence restraining order against Paula. He denied ever abusing Paula in any way and asserted she "has a history of serious mental illness, drug and alcohol abuse, erratic behavior and suicide attempts."

II.

Domestic Violence Restraining Order

Over three days in February 2015, the respondent court conducted an evidentiary hearing on the requests for domestic violence restraining orders. On February 18, the respondent court granted Paula's request and denied Christopher's.

The court issued a domestic violence restraining order against Christopher; the order named Paula, T.D., and F.D. as protected persons. The domestic violence restraining order, which is five years in duration, has an expiration date of February 18, 2020. The order provides that Christopher must not contact Paula, T.D., and F.D., "either directly or indirectly, by any means, including, but not limited to, by telephone, mail, e-mail or other electronic means." The order prohibits Christopher from taking any action, directly or through others, to obtain the address or location of Paula, T.D., and F.D. The order also prohibits Christopher from owning any "guns, other firearms, and/or ammunition" (boldface omitted) and requires him to sell or turn in to a law enforcement agency any guns or other firearms in his possession or control.

Along with the domestic violence restraining order, the respondent court issued a custody order and visitation order awarding Paula legal and physical custody of T.D. and F.D. and ordering no visitation to Christopher.

III.

Paula's Ex Parte Request for a Move-away Order

On March 16, 2015, Paula submitted an ex parte request for a "temporary emergency court order" (capitalization omitted) allowing her to move to England with T.D. and F.D. Paula did not provide notice to Christopher or his attorney of the ex parte request.

As factual support for the ex parte request, Paula declared, under penalty of perjury: "I believe it is necessary for me to take T[.D.] and F[.D.] to live with me in England due to Christopher's continued threats that he will be coming after us. He has indicated that he 'is handling things and just waiting for it,' and also has been continually reaching out to my sister saying that he knows where I am living. There is no way he would know this unless he is following us or having us followed. Christopher also has stated that he knows our daughters are in public school, which he would not have known

unless he was following us, as I have kept their schooling confidential. As a result of these threats, I have called the police in my area to express my concerns, however, they are unwilling to write up a report at this time unless he explicitly shows up at the house. [¶] I have airline tickets booked. I am seeking to have the hearing on this Request for Order without notice because I fear what potentially catastrophic actions my husband would take if he had notice. [¶] I am seeking nothing from Christopher in the way of child or spousal support, nor rights to any of our shared property. I simply want to go back to England with our daughters to start our new life over without the constant fear of him coming after us."

In an attached declaration regarding ex parte notice, Paula declared she did not give Christopher notice of the ex parte request because "I am fearful of what my husband would do with advance notice of this request for permission to leave the country because he has indicated that he knows where I am living with my two daughters."

Paula submitted photographs of e-mail messages that Christopher had sent to T.D. and F.D., saying he "is handling things and just waiting for it" and "[s]orry you're at public school." Paula also submitted a copy of an e-mail message she had received from her brother, informing her that Christopher had posted something on Facebook "about his girls going to a public school" and "about taking things into his own hands."

The respondent court granted the request for a temporary emergency order on March 17, 2015. No hearing was held. An order (the temporary move-away order) was issued granting Paula "[p]ermission to leave the country with two minor daughters."

A proof of service, filed on April 1, 2015, shows the ex parte request for a temporary emergency order, the temporary move-away order, and the declaration regarding ex parte notice were served on Christopher by mail on March 18, 2015. Paula flew to England with T.D. and F.D. on March 25.

IV.

Christopher's Writ Petition

Christopher filed his petition for writ of mandate or prohibition on April 20, 2015. He asks for issuance of a peremptory writ in the first instance under *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178. The prayer in the petition seeks an order "directing Respondent Court to vacate its March 17, 2015 order[] permitting [Paula] to move the two minor children to England; issue an order that [Paula] forthwith return the minor children to Orange County; and to conduct a hearing to establish contact between the two minor children and [Christopher]." The writ petition does not challenge the domestic violence restraining order except as to the matter of contact between Christopher and the children.

Christopher did not seek an immediate stay. He contended grounds existed for an immediate stay, but a stay request was rendered moot by the respondent court's failure to issue the automatic 30-day stay under Code of Civil Procedure section 917.7 (section 917.7).

We issued an order asking for an informal response from Paula and specifically asked her to address the 30-day automatic stay in section 917.7, as applied in *Andrew V. v. Superior Court* (2015) 234 Cal.App.4th 103, 109 (*Andrew V.*). We also asked her to discuss *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116 and *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047 (*Keith R.*).

In June 2015, Paula submitted her informal response and additional exhibits in support. The exhibits included two documents (exhibits Nos. 4 and 5) and three declarations (exhibits Nos. 16, 17, and 18), which were created after March 17, 2015 and were not before the respondent court. The declarations are not signed under penalty of perjury. Christopher has moved to strike those exhibits.

On April 15, 2015, Christopher filed a notice of appeal from the February 18, 2015 domestic violence restraining order, and this appeal has been docketed as No. G051818. On April 20, 2015, Christopher filed a notice of appeal from the temporary move-away order, and this appeal has been docketed as No. G051855. Briefing on both appeals has been stayed pending our decision on Christopher's writ petition.

DISCUSSION

I.

Visitation and Contact Order

Christopher contends the respondent court abused its discretion by ordering that he have no visitation or contact with T.D. and F.D. during the five-year duration of the domestic violence restraining order. He asserts that order is contrary to the state policy of assuring children have continuing and frequent contact with both parents and "will render [T.D. and F.D.] fatherless for the next five years of their lives."

Family Code section 3020, subdivision (b) states: "The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be *in the best interest of the child*, as provided in Section 3011." (Italics added.)

Other provisions of the Family Code carry out this policy by requiring the family court to consider and make findings on the best interest of the child in making visitation and contact orders. Family Code section 3100, subdivision (a) states the court "*shall grant* reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to *the best interest of the child*." (Italics added.) Section 3100,

subdivision (b) states that if a domestic violence restraining order has been directed to a parent, the court must consider whether "the best interest of the child" requires that any visitation by the restrained parent be limited to monitored visitation or whether to suspend or deny visitation altogether. Likewise, under Family Code section 3031, subdivision (a), if a domestic violence restraining order has been issued against a parent, the family court is encouraged not to make a custody or visitation order that is inconsistent with the restraining order unless the court makes two findings: (1) the custody or visitation order "cannot be made consistent with" the restraining order and (2) "[t]he custody or visitation order is in the best interest of the minor." (Fam. Code, § 3031, subd. (a)(1), (2).) The court must consider whether the best interest of the child requires that any visitation by the restrained parent be limited to monitored visitation or whether to suspend or deny visitation. (*Id.*, § 3031, subd. (c).)

The same best interest of the child standard applies when the family court makes a custody or visitation order in connection with a domestic violence restraining order. The court has the power to make an order determining the temporary custody of minor children and visitation rights of the noncustodial parent after a noticed hearing conducted on a request for a domestic violence restraining order. (Fam. Code, §§ 6323, 6340, subd. (a).) When making an order for visitation or custody in that situation, the court "shall consider whether the best interest of the child" requires that any visitation by the restrained parent be limited to monitored visitation or whether to suspend or deny visitation altogether. (*Id.*, § 6323, subd. (d).)

The respondent court's no-visitation or no-contact order was extreme and in direct conflict with the policy expressed in Family Code section 3020, subdivision (b). The respondent court made no findings under Family Code section 3031, 3100, 6323, or 6340 to support the order, and nothing in the record suggests the court considered the best interest of T.D. and F.D. in ordering that Christopher have no visitation or contact whatsoever with them for five years. There was no evidence presented, as far as we can

tell, that Christopher directed any domestic violence toward T.D. or F.D. or that he did not have a beneficial relationship with them. Indeed, the respondent court sustained objections to testimony about Christopher's relationship with T.D. and F.D. and stated, "[i]t is clear to this court that [Christopher] was involved with the children on a regular basis, very involved, and there's no need for that testimony to come in, so I'm not going to allow it."

The judge who presided over the hearing on the requests for domestic violence restraining orders has recused herself from the case. It is therefore necessary to have the judge presently assigned to this case conduct an evidentiary hearing on the issue of visitation and contact, make any required findings, and issue a new visitation and contact order consistent with the cited provisions of the Family Code. We offer no comment on what the nature or scope of any visitation and contact order should be. Pending the hearing, the present visitation and contact order in the domestic violence restraining order shall remain in force. For reasons we shall explain, Paula, T.D., and F.D. need not return to Orange County for the hearing and may testify by telephone or Skype, unless the respondent court, in the exercise of its discretion and for good cause, determines otherwise.

II.

The Temporary Move-away Order

Christopher challenges the temporary move-away order on the grounds it was made on an ex parte basis, he was not provided notice of the request, and the order was made without an adversarial hearing. Several opinions from this court have stressed that a full adversarial proceeding hearing must be conducted before the court may issue an order permitting one parent to move out of state with minor children. (*Andrew V.*, *supra*, 234 Cal.App.4th at p. 107; *Keith R.*, *supra*, 174 Cal.App.4th at p. 1052; *In re Marriage of Seagondollar*, *supra*, 139 Cal.App.4th at pp. 1119-1120.) "Adherence to

fundamental procedural safeguards is critical in move-away situations, which are among '"the most serious decisions a family law court is required to make," and should not be made "in haste."' [Citation.] These steps are necessary to facilitate the strong public policy favoring stable custody arrangements between parents who share joint legal and physical custody. [Citation.]" (*Andrew V., supra*, at p. 107, citing *In re Marriage of Seagondollar, supra*, at pp. 1119-1120.)

The safeguards provided by a full adversarial hearing extend to temporary move-away orders, such as the one issued by the respondent court. (*Andrew V., supra*, 234 Cal.App.4th at p. 107.)

No hearing was conducted on Paula's ex parte request for an order permitting her to move to England with T.D. and F.D. Paula has attempted to fill in what happened behind closed doors by submitting declarations from her counsel and herself about the information which, they state, was orally provided to the respondent court. Those declarations, exhibits Nos. 16, 17, and 18 in support of Paula's informal response, consist almost entirely of inadmissible hearsay and, most critically, were not signed under penalty of perjury. (See Code Civ. Proc., § 2015.5.) We grant Christopher's motion to strike exhibits Nos. 16, 17, and 18. We also grant Christopher's motion to strike exhibits Nos. 4 and 5 in support of Paula's informal response because they were prepared and filed in May 2015, after issuance of the orders being challenged.

Yet, while the temporary move-away order was issued ex parte without notice to Christopher, we must also consider the circumstances under which Paula made her ex parte request. California Rules of Court, rule 3.1204(b)(3) permits a court to grant an ex parte order without notice to an affected party when the applicant for the order has satisfied the court that, "for reasons specified, the applicant should not be required to inform the opposing party." In support of her ex parte request, Paula submitted a declaration and evidence establishing to our satisfaction that the respondent court acted well within its discretion in issuing an order without ex parte notice to Christopher.

The declaration and evidence submitted by Paula supported a finding that she, T.D., and F.D. potentially were in danger from Christopher. The declaration and evidence established that Christopher had, in violation of the domestic violence restraining order, learned where T.D. and F.D. attended school and had sent e-mail messages and made Facebook postings that could be interpreted as threats to Paula. Christopher's conduct was made all the more threatening by his failure to submit proof that he had sold his guns or turned them in to law enforcement, as required by the domestic violence restraining order. Just a month before the ex parte application, the respondent court had conducted a three-day evidentiary hearing on Paula's request for a domestic violence restraining order. During the hearing, the respondent court reviewed exhibits, heard and watched Paula and Christopher testify, and had the opportunity to assess their credibility and demeanor. The potential dangers facing Paula, T.D., and F.D. distinguish this case from *Andrew V.* and *Keith R.*, where no such exigent circumstances were present.

As Christopher argues, Family Code section 3064 restricts a court's ability to make or modify custody orders on an ex parte basis.[1] The temporary move-away order did not, however, modify a custody order because the domestic violence restraining order already had granted Paula temporary sole legal and physical custody of T.D. and F.D. The temporary move-away order did not modify the temporary custody order by turning

[1] Family Code section 3064 states: "(a) The court shall refrain from making an order granting or modifying a custody order on an ex parte basis unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed from the State of California. [¶] (b) 'Immediate harm to the child' includes, but is not limited to, the following: [¶] (1) Having a parent who has committed acts of domestic violence, where the court determines that the acts of domestic violence are of recent origin or are a part of a demonstrated and continuing pattern of acts of domestic violence. [¶] (2) Sexual abuse of the child, where the court determines that the acts of sexual abuse are of recent origin or are a part of a demonstrated and continuing pattern of acts of sexual abuse."

it into a permanent one. Thus, ex parte issuance of the temporary move-away order did not violate section 3064.

Christopher argues the respondent court erred by failing to issue the 30-day stay of the temporary move-away order afforded by section 917.7. He asserts that "[h]ad Respondent Court not failed to issue the automatic 30 day stay as set forth in . . . [section]917.7, Paula would still be in the United States so that this court could consider issuance of a stay pending appeal." There was no reason for the respondent court to issue the stay under section 917.7 because it arises automatically "by operation of law" for 30 calendar days. Christopher filed his petition for writ of mandate on April 20, 2015, more than 30 days after the temporary move-away order was issued, and after the mandatory stay had expired.

In that respect, this case is distinguishable from *Andrew V.*, *supra*, 234 Cal.App.4th 103, in which a panel of this court concluded the trial court erred by refusing to recognize the mandatory stay of section 917.7. In *Andrew V.*, the move-away hearing was conducted and the order made on January 14, 2015. (*Id.* at p. 106.) At the hearing, the trial court declined the request of father's counsel to "recognize" the automatic stay of section 917.7. (*Andrew V.*, *supra*, at pp. 106-107.) Father filed his petition for writ of mandate on January 20, 2015, and a panel of this court issued a peremptory writ of mandate on January 23. (*Id.* at p. 107.) In *Andrew V.*, the court declined to lift the automatic stay and ordered the children to be returned to California "forthwith." (*Id.* at pp. 109, 110.) Here, unlike in *Andrew V.*, the automatic stay of section 917.7 expired before Christopher filed his writ petition.

Although exigent circumstances justified issuing the temporary move-away order by ex parte request without notice to Christopher, the order is temporary, and an evidentiary hearing, following proper notice, must be conducted to determine whether to issue a permanent order. We will direct the respondent court to conduct such an evidentiary hearing, governed by the best interest of the children standard. (*Andrew V.*,

supra, 234 Cal.App.4th at p. 107; *Keith R., supra,* 174 Cal.App.4th at p. 1054.) In addition, an evidentiary hearing to determine permanent custody must be conducted because a custody determination made as part of a domestic violence restraining order is not permanent. (*Keith R., supra,* at p. 1051.) The best interest of the child standard governs the determination of custody. (*Ibid.*)

III.

Issuance of Writ and Proceedings on Remand

A peremptory writ in the first instance is proper to resolve this purely legal matter where the issues of law are well settled. (*Andrew V., supra,* 234 Cal.App.4th at p. 109; *Keith R., supra,* 174 Cal.App.4th at p. 1057.) In child custody disputes, there is a particular need to accelerate the process of writ review because "'children grow up quickly and have immediate needs.'" (*Andrew V., supra,* at p. 109.) Notice has been provided to Paula in compliance with Code of Civil Procedure section 1088 and *Palma v. U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d at page 180, and we have received and considered her opposition.

Accordingly, we will grant, in part, Christopher's petition for writ of mandate in the first instance. The respondent court is directed on remand to (1) conduct an evidentiary hearing on the issue of visitation and contact, make appropriate findings, and issue a new visitation and contact order; (2) conduct an evidentiary hearing on whether to issue a permanent order permitting Paula's move to England with T.D. and F.D.; and (3) conduct an evidentiary hearing to determine permanent custody over T.D. and F.D. These hearings may be conducted separately or consolidated and may be set by notice given by Christopher, Paula, or the respondent court. In all cases, notice must be given, and notice must be proper and timely. Christopher and Paula must be given the opportunity to present evidence relevant to the issue of the best interest of T.D. and F.D. The best interest of T.D. and F.D. is paramount, and "[t]he best interests of the children

require that the parents' competing claims be heard in a calm, dispassionate manner, with adequate time to marshal and present evidence." (*Andrew V.*, *supra*, 234 Cal.App.4th at p. 107.)

The domestic violence restraining order, issued on February 18, 2015, shall remain in force. The visitation and contact portion of the domestic violence restraining order, and the temporary move-away order, issued on March 17, 2015, shall remain in force pending the outcome of the required evidentiary hearing or hearings. Paula, T.D., and/or F.D. need not return to Orange County but may testify by telephone or Skype unless the respondent court, in exercise of its discretion and for good cause, determines otherwise. A condition to requiring Paula, T.D., and/or F.D. to return to Orange County to testify is satisfactory proof by Christopher that he has complied with the domestic violence restraining order by selling any guns and firearms in his possession or control to a licensed gun dealer or turning them in to a law enforcement agency.[2]

DISPOSITION AND ORDER

The petition for writ of mandate is granted in part and denied in part. Let a peremptory writ of mandate issue directing the respondent court to conduct an evidentiary hearing or evidentiary hearings and to make findings and orders in accordance with this opinion.

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[2] At the hearing on Paula's request for a domestic violence restraining order, Christopher testified his guns were at a pawn shop. Pawning the guns is not sufficient to comply with the domestic violence restraining order. It states: "You cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get guns, other firearms, and/or ammunition while the order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to a licensed gun dealer or turn in to a law enforcement agency any guns or other firearms that you have or control. The judge will ask you for proof that you did so. If you do not obey this order, you can be charged with a crime. Federal law says you cannot have guns or ammunition while the order is in effect." (Boldface omitted.)

The stay of appeal No. G051818 is lifted, and Christopher's opening brief must be filed within 30 days of the filing date of this opinion. The stay of appeal No. G051855 remains in place. We lift the stay imposed on August 27, 2015, in this matter, to the extent necessary to permit compliance with this writ of mandate.

In the interest of justice, the parties shall bear their own costs in this original proceeding.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.